IN THE

Supreme Court of the United States

No. 590 **October Term, 1923**

GEORGE R. MEEK, *Petitioner.*

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

Respondents.

No. 591 **October Term, 1923**

FLORENCE F. DALE, *Petitioner.*

v.

SAME, *Respondents.*

No. 592 **October Term, 1923**

ANDREW BREEZE, *Petitioner.*

v.

SAME, *Respondents.*

Certiorari to Circuit Court of Appeals for Third District.

Supplemental Brief on Behalf of Petitioners as to Continuance of Proceedings

Counter Statement of Questions Involved

First. Do proceedings in involuntary bankruptcy abate by reason of the death of the petitioner before adjudication, so far as the partnership as an entity and the non-consenting partners are concerned?

Second. Are the proceedings fatally defective because of the misjoinder in the petitioner's petition for his voluntary bankruptcy with the demand for the involuntary bankruptcy of the alleged non-assenting partners as well as the partnership?

Third. Whether or not the petition as an involuntary petition in bankruptcy is fatally defective because it fails to aver generally or specifically an act of bankruptcy?

Fourth. Whether or not the petition asking for an adjudication of an involuntary bankruptcy against the partnership and non-assenting partners is fatally defective because it fails to aver that the petitioner is a creditor of the same?

Fifth. Whether or not the Federal Court in Bankruptcy has jurisdiction where the petitioner sets forth the recent death of one of the partners and the further fact that her estate is being settled in the Orphans' Court having jurisdiction therein?

BRIEF

The record now in this Court reveals the fact that each of the three appellants, George R. Meek, Florence F. Dale and Andrew Breeze deny that they are members of the partnership doing business under the name of the "Centre County Banking Company," and the opinion of said Court heretofore filed in this case April 7, 1924, notes the denial of partnership by two of these appellants.

We concede, however, that in the present argument their status must be accepted as non-consenting partners. But we insist that the questions on their behalf, both jurisdictional and the legal effect of John M. Shugert's death, must be determined solely from the record.

Therefore, we seriously object to the effort of counsel for the intervening administrator, one of whom represented the original petitioner, to interject into their argument statements of fact which are not a part of the record and before the Supreme Court of the United States, and we particularly object to the statement in their last brief which is as follows:

> "Consideration may also be given to the fact that Mary C. Harris, a co-partner, whose individual assets are considerably larger than those of any other member of the firm, and who has filed a schedule in the bankruptcy court of her assets and liabilities, has filed no protest. It will probably not be disputed that the net value of her estate is more than twice that of the combined estates of the three appellants."

Upon this statement of fact is predicated one of the questions which opposing counsel say is involved in this case.

What Mary C. Harris has done or may do has nothing to do with this case or at least the issues now before this Court; nor can she in any way abridge or minimize the legal rights of these three alleged partners, much less can she confer a jurisdiction on the courts other than that already vested in them by the law. Therefore, the amount of her estate is wholly irrelevant and immaterial. While we fully realize that this Court will pass judgment only upon what is contained in the record now before it, we feel it to be our duty to call to your attention that the record does not disclose the actions of Mary C. Harris, the value of her estate or the value of the estates of the three appellants.

I

The first argument of the learned counsel for the intervening administrator is in direct variance with the decision of this Court in this very case, for in the opinion of Mr. Justice Sanford, filed April 7th, 1924, is found the following definite determination:

> "It is clear, however, that whatever may be the effect of this provision (Sec. 8, Bankruptcy Act of 1898) when construed in the light of Sec. 1 a. defining the term "bankrupt" it can have no application except to that part of the petition in bankruptcy in which Shugert sought to have himself adjudicated a voluntary bankrupt—a matter not in issue under the motions to dismiss and not now before us."

Therefore, a composite question is still before the Court

which is roughly divisible into two parts. First, whether or not under the state of the record, John M. Shugert, if still living could maintain his petition; and secondly, the effect of his death before final adjudication.

II

We have in the several briefs, heretofore filed in this case, discussed quite fully the questions that were raised for determination by us while Mr. Shugert was still living, and we will therefore briefly, for the convenience of the Court, consider them as follows:

(a) Could John M. Shugert by a single combination petition pray for a voluntary adjudication of bankruptcy as to himself individually, of the Centre County Banking Company an alleged partnership of which he claimed to be a partner, and of three individuals, namely, the appellants, and admittedly not consenting to the procedure?

(b) Can Shugert maintain a petition that is involuntary as to the partnership and his alleged partners without an averment that he was a creditor and represented the required statutory indebtedness?

(c) Could he maintain his petition as an involuntary proceeding in which he averred no acts of bankruptcy, either on the part of the alleged partnership or of his alleged non-consenting partners?

(d) Can his petition be maintained where he averred the death of one partner that raised a presumption of law as to the dissolution of the partnership?

(e) Can a petition in bankruptcy be maintained that avers the death of a partner and the further fact that the deceased partner's estate was in the course of settlement in the Orphans' Court of Centre County, a court of competent and exclusive jurisdiction?

A. In the opinion filed April the 7th, 1924 this Court has already determined that Shugert's petition was an involuntary one as to the three appellants and necessarily involuntary against the partnership because the record discloses that the three appellants as alleged partners were non-consenting.

It seems to us that the combination of a voluntary and involuntary proceeding in bankruptcy arising from a single petition is unthinkable and necessarily leads to complications in practice that make such combination impracticable, if not fatal. We concede that if Shugert as a partner was authorized by his fellow partners to ask voluntarily on behalf of the whole partnership and as the agent of each of the partners that the difficulties might be minimized, though not completely removed, for in the election of a trustee there would be a clash of interests between the creditors of the partnership and the creditors of the individual partners. Who could determine in such a proceeding whether there should be one trustee for all the several estates or separate elections by the several classes of creditors of trustees in each separate estate. Such an involved situation ought not to be tolerated unless authorized by law. We, therefore, urge that this petition be adjudicated a fatal misjoinder.

B. In further discussion of the decedent's petition, in view of the determination of this Court quoted *supra*, we shall assume that the said petition so far as it pertains to the three appellants and the alleged partnership to be involuntary. From this angle it is fatally defective, for it is not instituted by the required number of creditors or for the alleged amount of indebtedness required by the statute; and these statutory requirements are jurisdictional and their absence fatal. How much more so when the petitioner does not aver that he is a creditor in any amount? It necessarily follows that the whole of the petition outside of that pertaining to his own voluntary bankruptcy is surplusage and as such falls from the discussion. This Court already concedes that there is no express grant of power by the Act of Congress in John M. Shugert to maintain his petition except upon express statutory grounds, and that his petition fails to set forth any of those grounds. Counsel for the intervening administrator in reality is urging the Court to legislate, by arguing that you as a Court of equity sitting in bankruptcy may sustain petitions brought by persons other than those named in the Act of Congress and without the required averments. We cannot conceive that this Court will do this, and thus invade the province of the legislative branch of the government especially when we realize that the Congressional legislation is itself in derogation of the common law rights of American citizens.

(C) This Court has already noted the absence of any allegation of bankruptcy in the decedent's petition. Hitherto all courts have agreed that in involuntary bankruptcy an averment of an act of bankruptcy is indispensible and without it jurisdiction is not vested in the bankrupt court.

The Act of Congress requires it as a condition precedent to jurisdiction. This seems to be the settled construction in our courts. Even a general averment of bankruptcy has been held to be insufficient and not curable by amendment unless made at least within four months of the date of the alleged act of bankruptcy. Under the canons of statutory construction that normally control the courts such a definitely required averment precludes the courts from recognizing a petition that neglects to comply with the Act. For this Court to concede the argument of counsel for the administrator would again amount to judicial legislation and will surely not be favored.

(D and E) In our first brief filed in this Court we discussed quite fully the effect of the averment in the petition, that one of the partners had died and that her estate was being settled in the Orphans' Court of Centre County. On any theory a court of competent jurisdiction has exclusive control over the assets of one partner and the exclusive *distribution* of said assets as well. There has been no settled procedure to meet such an exigency; there is no recognition or provision in the congressional legislation for such an exigency, nor has there been established any such procedure by judicial decree or interpretation. The more such a situation is analyzed the greater the difficulties become, and the thoughtful mind can well approve the dictum in "Collier on Bankruptcy," wherein he concludes that the jurisdiction of the Federal Courts in bankruptcy as to such a partnership is extremely doubtful and should be expressly vested in them by legislation.

Thus far our argument upon the several jurisdictional questions, just briefly touched upon, is a *resume* of our earlier brief. Since then however our reasoning has been immensely strengthened *if not made unanswerable,* by your ruling of April 7th, 1924, in this case. Mr. Justice Sanford very clearly defines the relative status of Shugert, the petitioner, with his alleged partners, the appellants, and the partnership itself, precisely as contended for by the appellants from the beginning of this controversy. We can not better express our thought as to the true relationship between the several parties, than by quoting the exact language of the learned Justice:

> "In other words, in so far as Shugert's petition sought not merely to have the partnership adjudged bankrupt as against the defendants, but also to have them adjudged as individuals, it was clearly an antagonistic proceeding. To that extent Shugert was not the "bankrupt" but stood in a position analogous to that of a creditor seeking the involuntary adjudication of his debtor. Even in so far as the petition sought to have the partnership adjudged bankrupt, the defendants, as non-consenting partners, were entitled, under the specific provision of General Order No. 8, to make defense "in the same manner as if the petition had been filed by a creditor of the partnership." Note 3, *supra.* And, a *fortiori,* they were entitled to make such defense to so much of the petition as sought their bankruptcy as individuals."

If Shugert stood in a position "analogous to that of a creditor seeking the involuntary adjudication of his debtor," it follows irresistibly that his petition must meet the statutory requirements imposed by Congress on Creditors' petitions. What good purpose would be served by exempting the dead petitioner from the need of averring the necessary jurisdictional facts? And if this High Court should

make a special exception in this case, where would such a precedent lead the profession?

It follows, if anything still more irresistibly, that if the non-consenting partners "may make defense in the same manner as if the petition had been filed by a creditor," they have the right to raise as against Shugert's petition the several questions of jurisdiction, that they stand upon. And these would prove fatal to any creditors' petition, and logically, therefore, to the Shugert petition. Or, conversely, Shugert's petition must contain the jurisdictional averments, the absence of which would be fatal in a creditors' petition, because the non-consenting creditors, as has been thus determined, may set up any defense to his petition that they could to a creditor's petition; and any defense necessarily includes the absence of jurisdictional averments.

III

We have already expressed in a former brief filed in the case our reasons why the whole proceedings should abate by reason of the petitioner's death, and we cannot now see on a later reconsideration that any substantial reason has been advanced why it should not abate. Conceding, as Mr. Justice Sanford has remarked, that it is one of "first impression," nevertheless our motion is based upon the same principles that have been applied to analogous cases. The Common law principle originally was that death did abate in every instance and each exception thereto has been created by statute. This Court, as we have argued heretofore, has noted this line of adjudication and has approved the principle that where the procedure is under an Act of

Congress and not regular otherwise the death of the actor will cause abatement unless otherwise provided in the Act itself. It is conceded that the Act of Congress of 1898 generally known as the present Bankrupt Act does not provide an exception to abatement in such procedure as this, except in the case of the "bankrupt," and it is further conceded and actually ruled by this Court that Shugert was not in the statutory definition the "bankrupt" so far as the procedure is between Shugert and the non-consenting partners and the partnership. He is a petitioner only. So far as the record discloses his petition represents himself individually and exclusive of every other interest, and his interest died with himself. There is no one to inherit it. It certainly was not assignable in his lifetime, nor when we consider the state of the record does the law impose upon the decedent's representative the duty and necessity of continuing the litigation. Especially is this so when the petition was not prepared by him on the theory that he was a creditor, but only as a partner.

For each and all of the above reasons we confidently urge that this entire proceeding be dismissed or abated.

Respectfully submitted,

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Attorneys for George R. Meek, Florence F. Dale and Andrew Breese Petitioners.

Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 590191 October Term, 1923.

GEORGE R. MEEK,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of George R. Meek for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____.

George R. Meek,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition, but avers that George R. Meek filed an answer, not only to the questions of law, but questions of fact to the original petition filed by the said Shugert in the Bankruptcy Court.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co–partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2[illegible] day of October, A. D., 1923.

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.
[Seal]

JOHN M. SHUGERT

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of
"John M. Shugert, Lavina Catherine Harris, deceased,
"George R. Meek, Mary C. Harris, Florence F. Dale,
"and Andrew Breeze, individually and trading as
"Centre County Banking Company,
"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

> "The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner. Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. MeNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non–consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
>
> In re Gerber, 186 Fed. 694.
>
> Sabin v. Blake-McFall Co., 223 Fed. 505.
>
> In re Langford, Felts & Myers, 225 Fed. 314.
>
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution crditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 599, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

Office Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 591 19

October Term, 1923.

FLORENCE F. DALE,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of Florence F. Dale for Writ of Certiorari.

S. D. GETTIG,
BELLEFONTE, PA.,
Attorney for Respondent.

N. B. SPANGLER,
BELLEFONTE, PA.,
Attorney for Creditors' Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____

Florence F. Dale,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition, but avers that Florence F. Dale filed an answer, not only to the questions of law, but questions of fact to the original petition filed by the said Shugert in the Bankruptcy Court.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co-partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2 day of October, A. D., 1923.

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.
[Seal]

JOHN M. SHUGERT

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of
"John M. Shugert, Lavina Catherine Harris, deceased,
"George R. Meek, Mary C. Harris, Florence F. Dale,
"and Andrew Breeze, individually and trading as
"Centre County Banking Company,
"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

"The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

> partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner.

Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. McNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 186 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution creditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

untary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition—shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if

"any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al., 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

FILED
OCT 6 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~592~~ 193 October Term, 1923.

ANDREW BREEZE,

Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,

Respondents.

Answer of Respondent and Brief to Petition of Andrew Breeze for Writ of Certiorari.

S. D. GETTIG,
BELLEFONTE, PA.,
Attorney for Respondent.

N. B. SPANGLER,
BELLEFONTE, PA.,
Attorney for Creditors' Committee.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

No._____

Andrew Breeze,
Petitioner,
AGAINST
Centre County Banking Company, a partnership, and John M. Shugert, individually,
Respondents.

Answer of Respondent to Petition For Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:—

The answer of JOHN M. SHUGERT, respondent, to the petition for a writ of certiorari in the above stated case, respectfully shows:—

I. Respondent admits the facts set forth in paragraph one of said petition, but denies that the same is an involuntary proceeding under the Bankruptcy Act of 1898.

II. Respondent admits that the petitioner moved to dismiss the proceedings in bankruptcy, for the reasons set forth in paragraph two of the petition, and for further

answer to said paragraph and sub-sections A, B, C, D, E, and F thereof, states as follows:

A. That the District Court has jurisdiction to allow or determine the petition in bankruptcy filed by the said John M. Shugert.

B. Respondent admits these facts, but avers that the petition filed by the said Shugert is not an involuntary petition under the Bankruptcy Act.

C. Respondent admits that the original petition filed by the said Shugert was a voluntary one, and avers that the amended petition was of like character.

D. Respondent denies these allegations and avers that neither the original nor amended petition showed that the partnership was dissolved and that the entire proceeding has been as to the jurisdiction of the Court, and that no evidence has been heard by the District Court to determine whether or not there was a dissolution of the partnership. Respondent further avers that even though there was a dissolution, the District Court has jurisdiction, if, upon taking of testimony, the evidence shows that the partnership debts remain unpaid and that the partnership and individual members are insolvent.

E. Respondent denies as a matter of law the allegations in said sub-section set forth.

F. The allegations in this sub-section are denied.

III. Respondent admits the facts set forth in paragraph three of said petition.

IV. Respondent admits the facts set forth in paragraph four of said petition.

V. Respondent admits the facts set forth in sub-section A of paragraph five of said petition.

Respondent admits the facts set forth in sub-section E. of paragraph five of said petition, except that no where has the District Court or the Circuit Court decided that the filing of the petition by John M. Shugert on behalf of himself, the said partnership and his co–partners, was an involuntary petition under the meaning of the Bankruptcy Act, but that the same was such a petition as said Act authorized a co-partner to file on behalf of himself, the partnership and its members.

Respondent denies sub-section C of paragraph five of said petition, as no such statement, as therein contained, was made in the order of the District Court or in the opinion, and decree of the Circuit Court, and further avers that the petition in bankruptcy filed in the District Court by the said John M. Shugert does not state that there has been any dissolution of the said partnership, by reason of the death of Lavina Catharine Harris, a member of the same, and no testimony has yet been taken before the District Court to determine whether under the written agreement of co-partnership a dissolution was caused by her death. Respondent further avers that under sub-section A of Section five of the Bankruptcy Act of 1898, there being no final settlement of the said co-partnership, the members thereof may be adjudged bankrupts before or after the dissolution of the partnership, and that whether the same occurred is not material in this proceeding.

Respondent admits the facts set forth in sub-section D of paragraph five of said petition, except that the Bankruptcy Act of 1867 did not expressly provide that one partner might file a petition to have the partnership adjudged a bankrupt, nevertheless the appellate courts held that the Bankruptcy Court did have such authority under said Act.

VI. Respondent avers that the facts set forth in paragraph six of said petition are not true, so far as the cases therein cited and relied upon by petitioner are concerned, as the same are not applicable to the facts in this case, but avers that said paragraph, so far as the same relates to the authorities of the Circuit Court of Appeals is concerned, are true and correct.

VII. In answer to paragraph seven of said petition, respondent avers that the questions therein raised for consideration are not such as will ordinarily be considered by this Court on petition for certiorari, for the reason that the same questions can be raised later by the petitioner when declared a bankrupt, and it is unusual to allow a writ of certiorari on an interlocutory order, where the same question may be raised thereafter in the same proceeding.

VIII. In answer to the eighth paragraph of said petition, respondent avers that the jurisdiction of the District Court to declare the petitioner and his co-partners, bankrupts, as contained in the record in this case, has been ruled by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695, 57 L. Ed. 1029, and followed by the Circuit Court of Appeals in this case, and that the allowance of the writ of ceriorari would, therefore, avail the petitioner nothing, but would only cause delay, resulting in great hardship to approximately 1200 creditors, many of whom are in destitute circumstances and in need of whatever pro rata they may obtain in a final settlement of the partnership affairs.

WHEREFORE, your respondent prays this Honorable Court that the writ prayed for by the petitioner be denied, and said petition dismissed, with costs.

JOHN M. SHUGERT.

STATE OF PENNSYLVANIA, }
COUNTY IN CENTRE. } SS:

JOHN M. SHUGERT being duly sworn deposes and says: I am the respondent, hereinabove named. I reside in the Borough of Bellefonte, County of Centre and State of Pennsylvania. Each and every allegation in the foregoing answer is true to my own knowledge, except as to the matters herein stated to be alleged upon information and belief; and as to those matters I believe the same to be true.

Sworn and subscribed before me this 2 day of October, A. D., 1923.

JOHN M. SHUGERT

ELIZABETH C. WALKER
NOTARY PUBLIC
My Com. Expires March 6, 1925.

[Seal]

BRIEF

RECORD AND PROCEEDINGS IN DISTRICT COURT, AND ORDERS MADE IN PURSUANCE OF SAME. ALLOWANCE OF WRITS OF CERTIORARI.

The Centre County Banking Company, a co-partnership, closed its doors and ceased business, May 13, 1922, because of insolvency, and John M. Shugert, one of the partners of said firm, on June 30, 1922 (Record pages 1, 8, 9 and 10) filed a petition in bankruptcy, on behalf of himself and said firm, in the District Court for the Middle District of Pennsylvania, wherein said firm was engaged in a general banking business.

Subpoenaes were awarded and served, except as to Andrew Breeze, who then resided out of said District, George R. Meek and Florence F. Dale, two of the petitioners, filed answers thereto, raising questions of fact, namely, denying that they were partners, (Record, pages 14, 15, 16 and 17). On these answers appear also the names of their counsel, although the record does not show it, without designating whether the appearance is general or special. An amended petition was filed in said Court by the said Shugert August 26, 1922 (Record, page 56) and after notice and argument by counsel representing all the parties, the same was allowed by the District Court September 15, 1922 (Record, page 54), and in pursuance thereof, subpoenas were awarded and served personally as to all parties, except Andrew Breeze, upon whom constructive service was had by publication.

The case was docketed in the District Court, not as set forth by petitioner in this court, and by respondent so as

to conform therewith, but as follows, (Record page 1):

"In the matter of

"John M. Shugert, Lavina Catherine Harris, deceased, "George R. Meek, Mary C. Harris, Florence F. Dale, "and Andrew Breeze, individually and trading as "Centre County Banking Company,

"Bankrupt."

No testimony has been taken before the District Court to determine the solvency or insolvency of said partnership and the individual members thereof, nor is the written agreement under which said firm did business in evidence.

In the case of Denver v. New York Trust Co., 229 U. S. 1101; 57 L Ed. 132-134, it was stated by this Court in its opinion that "the exceptional power to review, upon certiorari, a decision of the Circuit Court of Appeals, rendered on an appeal from an interlocutory order, is intended to be and is sparingly exercised."

It is unusual that the questions raised by the petitioners should be heard by this court at this stage of the bankruptcy proceedings. No adjudication in bankruptcy has been made by the District Court.

In the case of in re Oregon Bulletin Printing etc. Co., 3 Sawy. 5229; 18 Fed. Cas. No. 10,560, the Circuit Court of Appeals said:

"No case has been found where a petition for review has been acted on before a final judgment upon the petition in bankruptcy."

It has been held in a number of cases, that, where an interlocutory decision may be reviewed on appeal from a final decree, a petition to revise will rarely be granted.

In re Chotiner, 218 Fed. 813.

In re Horowitz, 250 Fed. 106.

II.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS.

The learned Counsel for the petitioners has attempted to place a strict and narrow construction upon the Bankruptcy Act of 1898, whereas the converse of this proposition has been followed by the bankrupt courts.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In the proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

We deem it unnecessary to cite any authorities to show that the act must be given a liberal construction.

It is conceded by counsel for petitioners that under Section 36 of the Bankruptcy Act of 1867, a partner could bring into the bankruptcy court his non-consenting part-

ners, on the ground that said section expressly provides that he may. It contains no such mandatory provision. Section 36 of said Act is as follows:

> "Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, is re Carleton 115 Fed. 247:

> "Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

Respondents contend, that the provisions of Section 5 of the Bankruptcy Act of 1898 are much broader than those of Section 36 of the Act of 1867, relating to partnerships. Paragraph (a) of section 5 of the Act 1898 reads as follows:

> "A partnership during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

This includes all kinds of partnerships, except as provided by section 4, and not merely those "in trade" as provided by the Act of 1867. That it was the intention of Congress to thus broaden the scope of the bankruptcy courts and simplify the practice is apparent from the privisions of paragraph (c) of Section 5 of the Act of 1898, which is as follows:

> "The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of the partnership and individual property."

It is plain that one partner may bring into the bank-

ruptcy court, all of the partners, and that its property and that of its members is subject to the jurisdiction of said Court for the purpose of liquidation. There has been diversity of opinion as to whether a partnership as an entity may be adjudicated a bankrupt; and where a partner files a petition in bankruptcy in behalf of himself, the copartnership and its individual members, it has been held in some jurisdictions, that while the property of the individual partners, as well as that of the firm, was subject to the jurisdiction of the bankruptcy Court, that the non-consenting partners could not be adjudicated bankrupts. These questions, under more recent decisions, have been practically settled by the Federal Courts. The better practice, and which is not prohibited by statute, is to adjudicate bankrupt the non-consenting partners, as well as the petitioner.

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

As to the practice in proceedings such as the case at bar, we quote the following from the opinion of Judge Lowell in the case above cited:

> "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy.

Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all it partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceeding is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actu-

ally committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the

firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act of 1898, has been construed by this Court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. That case originated by adverse proceeding upon petition of creditors. It has nevertheless established "uniformity of decision", if any were necessary, in cases like the present. The commendation therein of the opinion of Judge Lowell by this Court, in a case similar to the present, and hereinabove quoted, should be a sufficient answer to all of the questions of law raised by the petitioners.

We, therefore, quote in full the opinion of this Court in Francis v. McNeal as follows:

"Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is,

so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand ,it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private

debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical result of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886, 85 C. C. A. 61, 157 Fed. 363, 13 Ann. Cas. 986, we regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and said, inter alia, as follows:

"We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insol-

vent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

"The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424), which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

In the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it

necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

> "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the

partners, shall be taken, exceptiong such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. *No.* 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re

Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455 Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupt, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law of the Circuit Court of Appeals, Eight Circuit, even where, on demurer, the petition in bankruptcy was dismissed as to the non-consenting partner.

Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt,

such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by this Court in Francis vs. MeNeal.

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

The weight of authority and the practice as now generally adopted is to adjudicate all partners bankrupts.

III.

GENERAL ORDER VIII.

Counsel for petitioners contend in effect that because the Act of 1867 provided for the issuing of a subpoena (warrant) and that no such provision is made in the Act of 1898, that this Court has exceeded its authority in adopting General Order VIII.

There is nothing in General Order VIII, defining the practice, which violates the Bankrupt Act of 1898, and read in connection with section 14, it is more logical, and the better practice, that the non-consenting partners should likewise be adjudicated bankrupts.

Section 30 of the Bankruptcy Act of 1898, expressly provides that "All necessary rules, forms, and orders *as to*

procedure and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." This General Order defines only the methods of procedure as to the non-consenting partner where the bankruptcy court has acquired jurisdiction of one partner as provided by paragraph C of Section 5 of said Act.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 186 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

IV.

JURISDICTION OF BANKRUPTCY COURT WHERE ONE MEMBER OF PARTNERSHIP DIES PRIOR TO THE FILING OF THE PETITION.

The petition in bankruptcy (Record 56) set forth:

> "That your petitioner and George R. Meek, Florence F. Dale and Andrew Breeze, who survive Lavina Catherine Harris, now deceased, also a partner in her lifetime, are and have been partners under the style of Centre County Banking Company, etc."

The petition alleges no dissolution of the partnership, either by the death of Lavina Catherine Harris, or otherwise, and there is no presumption of such dissolution, by a

mere statement in the petition that she is dead and that her estate is being administered by the Orphans' Court. But even though a dissolution had occurred, which is not a fact, by reason of her death; under paragraph (a) of Section 5 of the Act of 1898, the surviving members, where no final settlement has been made, may be adjudged bankrupt, not by separate petitions, but as members of the partnership, which is brought in with them. This construction is more apparent since the decision of this Court in the McNeal case, as to the entity doctrine of partnerships.

The petition (Record 57) also sets forth:

> "That there has been no final settlement of the partnership business of said parties, doing business as the Centre County Banking Company; and there are debts of said partnership, which are unsettled and unpaid, amounting to more than one thousand dollars. That each of said partners is insolvent and they are jointly or severally unable to pay said partnership debts."

In re Meyer, 98 Fed. 976, the partnership consisted of Charles H. Meyer; Henry L. Meyer and Joseph R. Dickinson. Charles H. Meyer died prior to the presentation of a petition to the District Court to declare said partnership and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdic-

tion of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency law of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re L. Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

"We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the partnership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat. Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss. 289, Fed. Cas.

No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

V.

DISSOLUTION OF PARTNERSHIP.

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalided by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving partners, where the business was being continued as provided in the partnership articles."
In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are

unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be a dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922

In the case last cited, on the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution crditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al., 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben.

386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In re Stowers et al, I Lowell, 528, Fed. Cas. No. 13,516; In re Hirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272."

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy &Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pomeroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The argument of the learned counsel for petitioners that, where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, is illogical. Would there be less interference if a proceeding had been instituted in the local Court by John M. Shugert, under our insolvent laws or by bill in equity? In either case, the jurisdiction as to the surviving partners, would be in the Common Pleas Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Such a proceeding would not oust the jurisdiction of the Orphans' Court in the settlement of the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships, made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been committed by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner

could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purposes for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First, Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the partnership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the

partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. VIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a vol-

untary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition—shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if

"any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al., 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bankruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondent contends that the Circuit Court made no error in sustaining the order of the District Court. That there is no such diversity of opinion by the District and Circuit Courts on the questions of law raised, as would move this Court to grant the writs of certiorari for the mere purpose of establishing "uniformity of decision" in matters of practice under the bankruptcy Act, and especially in view of the hardship imposed upon many destitute persons, who are creditors of the Centre County Banking Company, and who have awaited patiently the termination of this litigation, and who are in dire need of whatever they may be able to obtain on a final settlement.

We, therefore, submit that the writs of certiorari should be denied, with costs to petitioners.

Respectfully submitted,

S. D. GETTIG,
Attorney for Respondent.

N. B. SPANGLER,
Attorney for Creditors' Committee.

Office Supreme Court
FILED
MAR 3 1924
WM. R. STANSB
CLE

IN THE

Supreme Court of the United States

NO. [redacted] 191 OCTOBER TERM, 1923.

GEO. R. MEEK,
PETITIONER,

v.

CENTRE COUNTY BANKING COMPANY, a Partnership, and JOHN M. SHUGERT, Individually, Bankrupts,
RESPONDENTS.

NO. [redacted] 192 OCTOBER TERM, 1923.

FLORENCE F. DALE,
PETITIONER,

v.

SAME,
RESPONDENTS.

NO. [redacted] 193 OCTOBER TERM, 1923.

ANDREW BREEZE,
PETITIONER,

v.

SAME,
RESPONDENTS.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THIRD DISTRICT.

SAMUEL D. GETTIG,
Bellefonte, Pa.,
Attorney for Respondents.

NEWTON B. SPANGLER,
Bellefonte, Pa.,
Attorney for Creditors' Committee.

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COUNTER-STATEMENT OF CASE.

The Centre County Banking Company was organized under written articles of co-partnership, made the first day of January, 1868, and from said date was engaged in a general banking business in the Borough of Bellefonte, Centre County, Pennsylvania, until the 13th day of May, 1922, when its doors were closed by reason of its insolvency. The liabilities at the time they quit business were approximately $521,000. The appraised value of the partnership property is approximately $272,000. As is the case with almost every institution of this kind, many of the creditors had deposited in said bank, at the time its doors were closed, their life's savings and they are in destitute circumstances.

On the 30th day of June, 1922, John M. Shugert, one of the partners in said bank, filed a petition in bankruptcy on behalf of himself and said partnership, in which official form for petitions in bankruptcy was followed as near as practicable (Record 8, 9, and 10). In pursuance of said petition subpoenaes were issued and served upon George R. Meek and Florence F. Dale, but no service was had upon Andrew Breeze at his usual place of residence, at Downingtown, in the County of Chester, in the Eastern District of Pennsylvania, and publication as to him was ordered for the purpose of obtaining constructive service. To the petition filed by the said Shugert, on behalf of himself and said partnership. answers were filed by George R. Meek and Florence F. Dale. The said Meek and Mrs. Dale both denied in said answers that they were partners in the Centre County Banking Company (Record 14, 15 and 16). To these answers, as will appear by same, Harry Keller and Orvis and Zerby appeared as Attorneys for George R. Meek, and Richard L. Bigelow of Hazelton, Pennsylvania, appeared as Attorneys for Florence F. Dale. The docket entries in

the record, as well as said answers, do not show the appearance of counsel, except in the case of Mr. Bigelow, who appeared by praecipe July 25, 1922, and who on October 9, 1922, withdrew his appearance for Mrs. Dale (Record 6). We do not think that counsel for petitioners will deny their appearance to these answers.

Upon the filing of said answers the matter of a hearing upon petition was referred by the Court to M. Ward Fleming. Counsel for George R. Meek and Florence F. Dale appeared on the day of said hearing, alleging that the said Referee had no jurisdiction in the matter and no testimony was taken (Record 23 and 38), and subsequently the matter was referred by petition to the District Court (Record 7 and 32), who on August 22, 1922, granted rules (Record 26 and 41). To these petitions to the District Court, alleging that the Court had no jurisdiction to issue a subpoena in the form, in which it was issued, answers were filed by John M. Shugert (Record 27 and 42). After argument on September 15, 1922, the District Court quashed the subpoenas, which had been served on Florence F. Dale and George R. Meek.

At the time said rules were pending and before the same were disposed of by the Court, John M. Shugert presented a petition to the District Court on August 26, 1922, to amend his original petition and the prayer was changed (Record 47 and 48). Notice was given to counsel for said Meek and Mrs. Dale of the application of said Court to amend the original petition, filed by John M. Shugert in the bankruptcy proceeding, of which they accepted service (Record 50 and 51). The petition as amended appears in the record pages 56, 57, 58 and 59.

The amendment was argued before the District Court at the same time that the above rules to quash the subpoenas were argued, and in the same order, in which subpoenas

were quashed, the said Court allowed the amendment (Record 54). To the petition to amend the original petition in bankruptcy no answers were filed and no protest made until after the order allowing same, when the questions involved in this proceeding were raised.

After the allowance by the District Court of said amended petition, subpoenas, as therein prayed for, were issued under the order of said Court and served upon George R. Meek and Florence F. Dale, as well as the other partners, except that no service was had upon Andrew Breeze, but publication was ordered and constructive service made (Record 60, 61, 62, 63 and 64). After the service of said subpoenas, petitions were again presented by the said George R. Meek and Florence F. Dale to the District Court for a motion to show cause why the same should not be quashed and set aside for want of jurisdiction (Record 65 and 74). To these petitions answers were filed by John M. Shugert, alleging, inter alia, that said Court did have jurisdiction of the matters set forth in the amended petition (Record 69 and 78). After argument said Court on October 20, 1922, denied the motions to dismiss (Record 77). From the order thus made by the District Court and that made later as to Andrew Breeze, petitions were filed in the United States Circuit Court of Appeals, for the third district, by the said Meek, Mrs. Dale and Breeze to revise as a matter of law said orders, above referred to, and were allowed by said court. The United States Circuit Court of Appeals heard the cases, affirming the order of the District Court.

BRIEF---ASSIGNMENTS OF ERROR.

After a period of more than three-quarters of a century, involving three bankruptcy acts, and after the present Act has been in force for more than twenty-five years, this Court is requested to hold that one member of a partnership, cannot bring into the bankruptcy Court, the partnership and all its members, where the partnership, as well as the individual members are insolvent; that the District Court had no authority to amend the original petition in bankruptcy; that General Order No. VIII is in effect legislation not authorized by the Act of 1898; that the bankruptcy court has no jurisdiction because one member of the firm died prior to the institution of these proceedings thereby dissolving the partnership, notwithstanding the fact that the present proceedings, prevented the offer in evidence of the partnership agreement, as no trial has yet been had by the District Court to determine who the partners are, if the same should be later controverted, and that a dissolution is fatal, although there is no final settlement as provided by clause (a) of Section 5 of the Bankruptcy Act of 1898.

The questions thus raised by the assignments of error, are grouped and discussed in the following titles:

AUTHORITY OF THE DISTRICT COURT TO AMEND THE ORIGINAL PETITION IN BANKRUPTCY FILED BY JOHN M. SHUGERT:

The petition for the amendment was filed in the District Court August 26, 1922 (Record 47, 48 and 49). Notice of the presentation of this petition was accepted prior to the filing thereof on August 22, 1922, by counsel for George R. Meek and Florence F. Dale.

Where no answer is filed Rule 32 of the United States Equity Rules provides:

> "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supplemental answer within ten days after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in case of an omission to put in an answer."

No answer thereto was filed by said parties. The District Court allowed the amendment in the same order in which he sustained the exceptions to the original petition (Record 54). The amended petition appears in the record, (pages 56, 57, 58, 59) and the subpoena with the caption issued thereon, on page 60.

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

General Order No. XI provides as follows:

> "The Court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed."

Rule 19 of the Rules of Equity Practice of the United States provides:

> "The Court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemented matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 43 of the Equity, as to defect of parties, provides:

> "Where the defendant by his answer shall suggest that the bill of complaint is defective for want of parties * * * * * the Court shall be at liberty to dismiss the bill, or to allow an amendment on such terms as justice may require."

We deem it unnecessary to cite any authorities to show that the Court had ample power to amend the original petition, to which no objection was made at the time.

AUTHORITY OF ONE PARTNER TO BRING INTO THE BANKRUPTCY COURT THE PARTNERSHIP AND ITS MEMBERS, ON A PETITION FILED BY HIM, WITHOUT THE CONSENT OF THE OTHERS:

Sections 5a and c of the Act of 1898, provide as follows:

"A partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

"The Court of Bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all the partners, and of the administration of thepartnership and individual property."

Section 36 of the Bankruptcy Act of 1867, provides:

"Where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue, etc."

This section, as stated by Judge Lowell, in re Carleton 115 Fed. 247:

"Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided *what should happen* after all had been adjudged bankrupt upon the petition of one partner or of a creditor."

It is apparent that the provisions of Section 5 of the Act of 1898 are much broader than those of Section 36 of the Act of 1867. If, as set forth in clause (c) of Section 5 of the Act of 1898, the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property, how is such jurisdiction to be obtained?

Section 1, defining the "meaning of words and phrases'" as used in the Act of 1898, and proceedings pursuant thereto, in clause 19, provides that the word "person" shall include partnerships. The same construction to the word "person" has also been given by this court in the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. The same is true of the word "person" in Section 3a of said Act, which provides as an act of bankruptcy by a

person "admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground." And Section 3b provides for the filing of an involuntary petition against a "person" which includes a partnership, and being any "person" as set forth in Section 4.

Section 2 defining jurisdiction and territorial limits of a court of bankruptcy, provides, inter alia, that they shall have "such jurisdiction at law and *in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings, * * * * * to adjudge persons bankrupt who have had their principal place of business, * * * * * within their respective territorial jurisdictions for the preceding six months, * * * * * or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction."

It is, therefore, apparent that the bankruptcy court under the Sections above cited has ample power and authority to declare, upon involunatry petition, all partners bankrupt, whose place of business was within its territorial jurisdiction, who committed one or more of the acts of bankruptcy provided in Section three of said Act, regardless of the fact that some of the members of the firm resided without the territorial district. The same is true of a voluntary petition signed by all members, although some may not reside in the district having jurisdiction of the proceedings.

It will thus be seen that the argument of the learned counsel for the plaintiffs in error, that clauses (c) of Section 5 of the Bankruptcy Act of 1898, "relates to the venue and is territorial in its application," is erroneous. It is illogical to argue that this clause was inserted in the Act for such a purpose, when the Act has already fully provided for the only methods by which plaintiffs in error allege

a partnership and its individual members may be declared bankrupt. If as plaintiffs allege, clause (c) of Section 5 has reference only to venue, why the necessity of clause (a) of the same Section? The former sections of the Act, according to plaintiff's theory, had already provided for the only methods which they admit a partnership can be put into bankruptcy.

The only logical conclusion is that one or more members of a partnership may bring into the bankruptcy court, the partnership, and all its members, by a petition; and if the word "person" as defined in Section 1 shall include the word "partnership" wherever used in the Act, then no act of bankruptcy need be alleged, except that of insolvency, as provided in Section 3. The petition thus filed is voluntary for all jurisdictional purposes of the Court. It may be said to be involuntary to the extent that the non-consenting partners may resist it, as provided by General Order No. VIII, to which we will refer later.

PRACTICE OF BANKRUPTCY COURTS WHERE A PETITION IS FILED BY SOME, BUT NOT ALL OF THE MEMBERS OF THE PARTNERSHIP:

> "Where a petition has been filed by one partner to bring his firm and his copartner into bankruptcy, the latter is not entitled to insist upon proof of an act of bankruptcy, which the petitioner is not required to allege either by the bankruptcy act or by the practice thereunder, nor can he set up the want of such an act as a defense to the petition, but he may set up the defense of solvency, since an adjudication of bankruptcy against all the partners is essential to one against the firm, and on that issue he is entitled to a trial by jury." In Re Forbes, 128 Fed. 137.

The opinion by Judge Lowell in the case just cited was commended by this court in Francis vs. McNeal as "an able opinion," and as it involves the same question as the cases at bar, we quote at some length therefrom as follows:

"But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases such as In re Dunnigan (D. C.) 95 Fed. 428, and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles of law. The equal and equitable distribution of the estate of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners. See Vaccaro V. Bank of Memphis, 103 Fed. 436, 43 C. C. A. 279; In re Blair (D. C.) 99 Fed. 76; Davis V. Stevens (D. C.) 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceedings is noramlly their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time.

The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See In re Mercur, 122 Fed. 384, 58 C. C. A. 472.

"The act of bankruptcy alleged in an involuntary petition as the basis of adjudication need not be actually committed by all the partners. Even their privity is not essential. 'An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members in this as in all other civil cases.' Lowell on Bankruptcy, 43. A voluntary petition is itself treated as an act of bankruptcy. In re Fowler, I Lowell, 161, Fed. Cas. No. 4, 998; Lowell on Bankruptcy, 30. It is not unreasonable, therefore, to hold that a petition by one partner does of itself dispense with proof of any other act of bankruptcy. In order to maintain his petition the petitioning partner cannot profitably be required to go through the form of giving a preference or of making a fraudulent transfer. If A. and B., two partners, are insolvent, and A., by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A. has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B., the nonassenting partner, insolvent by the terms of the supposition, and bound as to the joint debts and assets by A.'s act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner

> have the right to contest the issue of insolvency substantially tendered by the petition, and on this issue he seems entitled to a jury trial. See In re Murray (D. C.) 96 Fed. 600. Upon whom lies the burden of proof need not now be considered. The court, therefore, holds that a nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but that he may set up the defense of solvency. If the firm is adjudged bankrupt, the adjudication must be several as well as joint. The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

Section 5 of the Bankruptcy Act had not been before the Supreme Court of the United States, so far as we are able to find, until the case of Francis vs. McNeal, 228 U. S. Supr. Ct. 695; 57 L. Ed. 1029. It is true that it originated by adverse proceedings by creditors. According to the report of this case, Francis had agreed, that if it was later found that he was a partner, that he would turn over his property to such person as the Court might direct. This he subsequently refused to do after a finding that he was a member of the firm. In affirming the judgment this Court stated in effect that he was estopped from denying the authority of the bankruptcy Court by his agreement.

Although an involuntary petition was filed in this case, this Court has so thoroughly construed Section 5, that the principal contentions of the plaintiffs in error, have been thoroughly established, and we, therefore, quote the opinion in full:

> "Since Cory on Accounts was made more famous by Lindley on Partnership, the notion that the firm is an entity distinct from its members has grown in popularity, and the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. But the fact remains

as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the bankruptcy act. Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts with money available for that end. A judgment could be got and the partnership debt satisfied on execution out of the individual estates.

"The question is whether the bankruptcy act has established principles inconsistent with these fundamental rules, although the business of such an act is, so far as may be, to preserve, not to upset, existing relations. It is true that by Section I, the word 'person,' as used in the act, includes partnership; that by the same section, a person shall be deemed insolvent when his property, exclusive, etc., shall not be sufficient to pay his debts; that by Section 5a, a partnership may be adjudged a bankrupt, and that by Section 14a, any persons may file an application for discharge. No doubt these clauses, taken together, recognize the firm as an entity for certain purposes, the most important of which, after all, is the old rule as to the prior claim of partnership debts on partnership assets, and that of individual debts upon the individual estate. Section 5g. But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula,—a guillotine for cutting off all the consequenses admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the conrary, we should infer from Section 5, clauses c, through g, that the assumption of the bankruptcy act was that the partnership and individual estates both were to be administered, and the only exception was that in h, 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt'. (30 Stat. at L. 548, chap. 541, U. S. Comp. Stat. 1901, p. 3424.)

"In that case, naturally, the partnership property may be administered by the partners not adjudged

bankrupt, and does not come into bankruptcy at all except by consent. But we do not perceive that the clause imports that the partnership could be in bankrupcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that.

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors from some of whom, at any time before. pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets, so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one cerainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within Section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee.

"If it be said that the logical reason of our opinion is that the partners ought to be put into bankruptcy whenever the firm is, as held by the late Judge Lowell, is an able opinion (Re Forbes, 128 Fed. 137), it is a sufficient answer that no objection has been taken but, on the contrary, Francis has consented and agreed to hand over his property according to the order of the court. So far as Vaccaro v. Security Bank, 43 C. C. A. 279, 103 Fed. 436, 442, is inconsistent with the opinion of the majority of Re Bertenshaw, 17 L. R. A. (N. S.) 886; 85 C. C. A. 61; 157 Fed. 368; 13 Ann. Cas. 986, we

regard it as sustained by the stronger reasons and as correct."

In the case of re Samuels, 215 Fed. 845, where an attempt was made to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent, the Circuit Court of Appeals, Second Circuit, quoted from Judge Lowell in the Forbes case, and cited Francis vs. McNeal as over-ruling certain other cases as follows:

> "We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insolvent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra."

Again in the case of Yungbluth v. Slipper et al, 185 Fed. 773, where it was held that a voluntary assignment of all the property and assets of a firm operating a private bank, to a receiver, though done by one partner and not participated in by the other, the Circuit Court of Appeals, Ninth Circuit, approved of the opinion of Judge Lowell, in re Forbes, and in referring to his opinion, on page 775 said:

> "The true construction of this feature of the bankruptcy law is, we think, best expressed by Judge Lowell, In re Forbes (D. C.) 128 Fed. 137, a case in which, in view of section 5 of the act (Act July 1, 1898, c. 541, 30 Stat. 547, U. S. Comp. St. 1901, p. 3424),

which provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt, he held that the partnership may not be made bankrupt except by an adjudication of all its partners, *and that the only defense a nonconsenting partner can make to the petition is that the partners are able to pay the partnership debts and their own debts, out of the joint or separate estates.*"

To the same effect is the case of re Carleton, 115 Fed. 246, in which a petition was filed by one member of a partnership, for the purpose of bringing into the bankruptcy court the partnership and his co-partner, the opinion cites authorities to show that neither under the bankruptcy acts of 1841 nor 1867, was it necessary for one partner to bring the partnership and its individual members into Court, to allege any acts of bankruptcy, other than insolvency of the firm and its individual members. In the opinion on pages 247 and 248, it is stated with reference to the Sections relating to partnerships under these Acts and that of 1898, as follows:

"The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

"Section 14 of the act of 1841 provided:

"That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are here exempted. 5 Stat. 448.'

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one part-

ner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; Ex parte Hall, Fed. Cas. No. 5,919; Ex parte Hull, Fed. Cas. No. 6,856; Bank v. Johnson, Fed. Cas. No. 133; Ex parte Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided:

> 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

> " 'In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an

act of bankruptcy, and to take all other defences which any debtor proceeded against is entitled to take by the provisions of the act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In re Stowers, Fed. Cas. No. 13,516; In re Noonan, Fed. Cas. No. 10,292; In re Hathorn, Fed. Cas. No. 6,214, In re Penn, Fed. Cas. No. 10,927. This was said in Re Gorham, Fed. Cas. No. 5,624; and in Re Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in Re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,366; Re Moore, Fed. Cas. No. 9,750; Re Little, Fed. Cas. No. 8,390; Re Smith (D. C.) 16 Fed. 465. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a nonjoining partner. In some other respects the proceedings were treated as voluntary. In re Wilson, 2 Low. 455; Fed. Cas. No. 17,784. * *

"Section 5 of the act of 1898 provides that 'a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof may be adjudged a bankrupt.' Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867."

It is apparent that the conflict of decisions under section 5 of the Act of 1898 arose, not from the right of the

bankrupt court to administer the individual property of the non-consenting partner, but whether the latter might be declared a bankrupt on a petition alleging only insolvency of the firm and its members.

It has been almost a universal practice of the bankruptcy courts, where the partnership and one or more, but not all the members of the firm, were adjudicated bankrupts, that the individual property of those not declared bankrupt, was subject to the jurisdiction of the bankruptcy court in the settlement of the partnership indebtedness, and this was held to be the law by the Circuit Court of Appeals, Eighth Circuit, even where, on demurrer, the petition in bankruptcy was dismissed as to the non-consenting partner. Armstrong vs. Fisher, 224 Fed. 97.

The rule that the individual property of a partner not adjudicated a bankrupt, shall be administered in the federal courts, the same as a partner, which has been adjudicated, is unfortunate, and is to be avoided wherever the same may be lawfully done. Not having been adjudicated a bankrupt, such partner may not receive a discharge, as provided by section 14 of the said Act. As was said by the Court in Francis vs. McNeal:

"On the other hand it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full."

GENERAL ORDER NO. VIII:

Section 30 of the Bankruptcy Act of 1898 provides:

> "All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

Section 2 of said Act provides, for the establishment

of courts of bankruptcy and provides, inter alia, that they "are thereby vested * * * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy, etc."

In General Order No. XXXVII, the Supreme Court of the United States recognizes that a proceeding in bankruptcy is an equitable proceeding, and provides, inter alia:

> "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice, established by the Supreme Court of the United States, shall be followed as nearly as may be."

General Order No. VIII is as follows:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

As a proceeding in Bankruptcy is an equitable one, the Act must be given a liberal construction. General Order No. VIII merely defines the practice under Section 5, relating to partnerships; and the authority to thus prescribe

the same is fully authorized by Section 30 of the Act, above quoted. The rule, therefore, is as much a part of the bankruptcy act as if it was originally a part thereof.

If additional authority were needed, it could be found in the Act of Congress of September 24, 1789, Chap. 20, Sec. 14 (1 Stat. at L. 81) Rev. Stat. 716, which empowers this Court, and the Circuit and District Courts of the United States "to issue all writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usuages and principles of law."

> "The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law."
> In re Gerber, 176 Fed. 694.
> Sabin v. Blake-McFall Co., 223 Fed. 505.
> In re Langford, Felts & Myers, 225 Fed. 314.
> In re Hoyt & Mitchell, 127 Fed. 969.

In delivering the opinion of the Circuit Court of Appeals, Brief page 30, Judge Davis, in construing Section 5 and General Order No. VIII stated:

"The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 had provided that "a partnership—may be ad-

and its members bankrupts. The District Court declared the partnership and Henry L. Meyer, individually, bankrupts, which adjudication was affirmed by the Circuit Court of Appeals, Second Circuit.

In the case of Vaccaro et al vs. Security Bank of Memphis, et al 103 Fed. 432, the Circuit Court of Appeals, Sixth District, where a partnership was composed of three brothers, A. Vaccaro, one of them having died prior to proceedings in bankruptcy against the partnership, said Court referring to the case of Re Meyer, stated:

> "Again, the act declares that the Court, having jurisdiction of one of the partners, may have jurisdiction of all, 'and of the administration of partnership and individual property.' In re Meyer, 39 C. C. A. 368, 98 Fed. 976, the court of appeals for the second circuit sustained an adjudication of bankruptcy against a firm as such where one of the members of the firm was dead, and where only one of two surviving partners was adjudged a bankrupt, and further held that the adjudication drew to it the administration of both the partnership assets and individual estates of the members. There is much analogy between the provisions of section 5 of the act of 1898 and the Massachusetts insolvency laws of 1838, as interpreted by the Massachusetts decisions. Philip v. Parker, 2 Cush. 175; Thompson vs. Thompson, 4 Cush. 127; Dearborn v. Keith, 5 Cush. 224; Hanson v. Paige, 3 Gray 239."

In re Stein and Company, 127 Fed. 547, the Circuit Court of Appeals, 7th Circuit, where one of the partners was insane, stated, inter alia, as follows:

> "We perceive no valid reason why this manifest purpose of the bankruptcy act should not have full effect. In the case of a decedent the proper probate court assumes the charge of and the disposition of his estate. But even then the partnership of which he was a member might, as we think, be properly adjudicated bankrupt as against the survivors, and the part-

nership estate administered by the bankruptcy court, since the decedent's interest in the estate extends only to the surplus after payment of partnership debts. So, also, in respect to a minor, neither he nor his estate is responsible for debts contracted by him during his minority. And yet we perceive no objection, where he is a partner in a copartnership, his interests therein being subordinate to the copartnership debt, to the adjudication of such copartnership as a bankrupt under the provisions of the present bankruptcy act. Conceding for the purpose of the argument—a question which we do not determine—than an insane person may not be adjudicated a bankrupt (upon which question see In re Pratt, 6 Nat Bankr. Rep. 276, Fed. Cas. No. 11,369; In re Weitzel, 7 Biss, 289; Fed. Cas. No. 17,365), nevertheless we think a copartnership of which he was or is a member may be so adjudicated, and the firm property applied to the payment of the firm debts. There is here no attempt to adjudicate the insane partner a bankrupt individually. The proceeding is merely to subject partnership property to the payment of partnership debts and for an adjudication of bankruptcy against the sane partner. The argument in the cases cited is so complete and satisfactory that the subject needs no further discussion."

DISSOLUTION:

Even though a dissolution had occurred by reason of the death of Lavina Catherine Harris, which is not a fact, where there is no final settlement, as provided by paragraph (a), Section 5 of the Act of 1898, the bankrupt Court has jurisdiction over the partnership and its surviving members.

"Under Bankr. Act July 1, 1898, c. 541, Section 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership after its dissolution by the death of one partner may be adjudged a bankrupt, and in such a case the proceedings are not invalidated by the fact that the petition did not refer to the deceased partner nor disclose that the partners named were surviving part-

ners, where the business was being continued as provided in the partnership articles."

In re Coe et al, 157 Fed. 308.

To the same effect is the case of In re Pinson & Co., 180 Fed. 787, where the Court said:

"The act also provides for the adjudication of a partnership so long as its affairs are unsettled. If there are outstanding firm debts at the time of the filing of the petition in a requisite amount, a proper case is made for adjudication, the other elements being present, though the partnership has long ceased to do business; otherwise not. The partnership affairs are unsettled within the meaning of this section so long as partnership debts are left unpaid. Debts which are binding upon the partners only by estoppel as to creditors without notice of dissolution are not firm debts. The administration might be of no avail if there were no assets, partnership or individual, for distribution; but the jurisdiction of the court to adjudicate would exist nevertheless, and it would be properly exercised for the purpose of affording opportunity to the firm creditors through the appointment of a trustee to discover such assets."

Although there may be dissolution of the partnership, where assets or debts of a partnership remain, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

Holmes v. Hamilton, et al, 160 Fed. 922.

In the case last cited, in the question of dissolution, Gilbert, Circuit Judge, stated, inter alia, as follows:

"GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution creditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed

his connection months prior thereto, and it is argued that at the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In re Crockett et al, 2 Ben. 514, Fed. Cas. No. 3, 402; In re Foster, 3 Ben. 386, Fed. Cas. No. 4,962; In re Noonan, 3 Biss. 491, Fed. Cas. No 1.0,292; In re Stowers et al, 1 Lowell, 528, Fed. Cas. No. 13,516; In re Rirsch et al (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418), in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In re L. Stein & Co., 127 Fed. 547. 62 C. C. A. 272."

It is unnecessary to cite any authorities to show that the Pennsylvania Statute, relative to partnerships, contravenes the Bankruptcy Act of 1898, and that the provisions of the former, cited by the learned counsel for petitioners, are not applicable here.

In the case of Fackleman, 248 Fed. 565, cited by counsel for petitioners, Pomeroy & Fackleman were partners in the grocery business in California; Fackleman sold out to Pomeroy, who continued the business in his own name until the time of his death. Fackleman had moved to Nebraska. Subsequently to the death of Pomeroy, a proceeding in bankruptcy was instituted in the District Court of California, against Fackleman, as surviving partner of Pom-

eroy & Fackleman, and against the latter individually. By reason of the non-residence of Fackleman, and that the firm had been out of existence for a number of years, the court had no jurisdiction.

Neither does the case of in re Evans, 161 Fed. 590, cited by counsel for petitioners, apply. There the partnership consisted of two persons. One member was dead. The other member continued the business for a number of years, and then filed a voluntary petition that he was the sole owner of the business conducted by him after the death of his partner, under the name of Evans & Co. Creditors then intervened to bring in other parties as members. No attempt was made to hold the estate of the deceased partner.

The case of Temple & Workmen, and Temple & Ledyard, Federal Case No. 13825; 23 Fed. Cases 835, cited by counsel for petitioners, does not apply. That case arose under the Bankruptcy Act of 1867, Section 36, relating to partnerships ,made no provision for an adjudication of bankruptcy "after its dissolution and before the final settlement" as provided by Section 5 of the Act of 1898.

In what forum could a proceeding be brought to wind up this copartnership, if not in the bankruptcy court? The insolvent laws of the State are suspended by the bankruptcy Act. There is no act in force in Pennsylvania to wind up the affairs of a bank which consists of a partnership. Such banks are now prohibited in this state by Statute. All State banks are incorporated, and under appropriate legislation are wound up through the State Banking Commissioner; and all National banks through Acts of Congress. We fail to see why a bank, consisting of a partnership, in the absence of express legislation providing for its liquidation, in case of insolvency or dissolution, should not be settled through the bankruptcy courts.

The argument of the learned counsel for plaintiffs in

error, that where the surviving members are adjudicated bankrupt, there is a consequent interference with the administration of the Probate Court, of the estate of the deceased partner, and for that reason, the bankruptcy court should not take jurisdiction, is unsound. If the affairs of the partnership could be liquidated in some other forum, it would certainly not be in the Probate Court. The creditors of the partnership would still be subject to a divided jurisdiction, with no better advantage than under the present proceeding. Whether the partnership creditors of the deceased member of the firm must present their claims in the probate court, is immaterial in this proceeding. Nevertheless, where all of the personal debts of such deceased partner, have been paid out of her individual property, and what is left is applicable only to partnership debts, there is no sound reason why such fund should not be turned over to the receiver or trustee, and thus be brought into hotchpotch for distribution, in the forum, where all creditors of the partnership must in any event present their claims. Necessarily there is a suspension of the power of the Probate Court, to compel partnership creditors to present their claims in that jurisdiction, when all other debts and claims have been settled, and when the only matter involved is a distribution of partnership debts of which another court, under a federal statute, has assumed jurisdiction.

The Bankruptcy Court undoubtedly has acquired jurisdiction of one of the partners, namely, John M. Shugert, and may, therefore, as provided by clause (c) of Section 5 of the Act, have jurisdiction of the others. The authorities show that it was never intended by Congress in passing the act of 1898, that a petitioning partner should be required to allege any other act of bankruptcy than insolvency as against the non-consenting partners. To be compelled to do so, would defeat the very purpose of the act. Undoubtedly, there are many instances where none of the acts of bankruptcy defined in Section 3 have been com-

mitted by any member of a partnership, except that of insolvency. If thereby one member could not bring into court the partnership and its non-consenting members, such petitioner could not be relieved by an individual voluntary petition, of his partnership liability. He might not be insolvent, so far as his individual debts are concerned. He would thus be deprived of the very purpose for which the act was passed, and would be excluded from the express provisions of Section 4 which defines who may or may not become bankrupts.

All the questions of law raised by the petitioners were decided by the Circuit Court in a very lucid opinion by Judge Davis. As a summary of all the questions involved, we quote his opinion, at length, which is as follows:

DAVIS, Circuit Judge. All three of these cases were argued together. The same questions arise in each and they will be disposed of in one opinion.

John M. Shugert, George R. Meek, Mary C. Harris, Florence F. Dale, Andrew Breeze and Lavina Katherine Harris conducted a banking business at Bellefonte, Pa., under the firm name of Centre County Banking Company. Lavina Katherine Harris died and while her estate was being administered in the Probate Court of Centre County, John M. Shugert filed a petition in his own name and in the name of the partnership in which he alleged that he individually, the partnership and his partners were all insolvent and prayed that he, the partnership and the partners, individually, be adjudged bankrupts. After the service of subpoena on all the partners personally except Andrew Breeze who was served by publication, the appellants filed petitions praying the court to dismiss Shugert's petition in bankruptcy for two reasons: First Shugert was without authority, without consent of his partners, to have the partnership and the individual members thereof adjudicated bankrupts; and, second, the part-

nership cannot be adjudicated a bankrupt because the estate of Lavina Katherine Harris, constituting part of the partnership estate, was being administered in the Probate Court of Centre County. Authority of one partner to institute proceedings in bankruptcy involving his partners individually and the partnership was conferred by section 36 of the Act of 1867, but this authority, they contend, was omitted from the Act of 1898 and this omission shows that Congress intended to repeal the authority granted in that section. But section 5 a and c, of the Act of 1898 provides that:

> (a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.
>
> (c) The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

General Order No. XIII provides that:

> "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by those rules in the case of a debtor petitioned against."

Appellants contend that the above section and General Order refer to involuntary and not voluntary petitions in Bankruptcy. General Order No. VIII was promulgated by the Supreme Court pursuant to section 30 of the Act of 1898 and had the force of law. This section provides that:

> "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

So far as the language of section 5 provides, the adjudication against a partnership may be based on either a voluntary or involuntary petition. The appellants admit that an adjudication may be based on an involuntary petition, but not on a voluntary petition filed by one of the partners. Under the authority of section 36 of the Act of 1867 a voluntary petition might be filed by "anyone" of the partners or by "any creditor" of the partnership. There is nothing in the language of section 5 of the Act of 1898 restricting adjudications to involuntary petitions. It simply provides that "a partnership—may be adjudged a bankrupt." Did not Congress in section 5 of the later Act tersely include everything contained in section 36 of the earlier Act? In the absence of any provision in the Act of 1898 to the contrary, we think the true interpretation requires it to hold that it did? If the Act of 1898 has provided that "a partnership—may be adjudged a bankrupt" on the petition of "any creditor", this would have indicated that Congress intended to deny to an individual partner authority to file a petition against the partnership. In that event, the argument of counsel that expressio unius est exclusio alterius would have force. Under the broad authority conferred by section 5 of the Act of 1898 a petition may be filed by "anyone" of the partners, and by "any creditor". The legal maxim on which counsel's argument on this phase of the case is based has no application to the facts before us.

General Order No. VIII provides that: "Any member of a partnership who refuses to *join in* the petition shall be entitled to resist the prayer" etc. By the words "join in", the Supreme Court has in mind a voluntary petition filed by a member of the partnership and this petition is distinguished from a petition filed by a "creditor" in which a member of the partnership would not "join in". Judge Lowell held in the case of In re Forbes et al. 128 Fed. 137,140 that a petition by one partner dispenses with the necessity of proof of any other act of bankruptcy by the

partnership and if the other partners do not "join in" the petition, they may resist it just as they might have done if "any creditor" of the partnership had filed an involuntary petition. The opinion received the commendation of the Supreme Court. Francis v. McNeal, 228 U. S. 695. Where a partnership is composed of two members and one of the members is adjudicated a bankrupt, but the other is not, the bankruptcy court may draw to itself and administer the estate of the other to an extent sufficient to pay the debts of the partnership adjudged to be bankrupt. Armstrong v. Fisher et al, 224 Fed. 97; Francis v. McNeal, 186 Fed. 481, affirmed in 228 U. S. 695; Yungbluth v. Slipper et al., 185 Fed. 773.

Does the fact that the estate of Lavina Katherine Harris is being administered in the Probate Court of Centre County, Pennsylvania, prevent adjudication and administration of the partnership in bankruptcy? "There is an apparent conflict of authority upon this question." Collier on Bankruptcy (12 Ed.) 175. The death of one of the partners does not in any wise affect the insolvency of the partnership. Insolvency does not depend upon whether the property liable to creditors is in the hands of a living surviving partner or in the hands of the administrator of his estate. Proceedings against an insolvent partnership and insolvent partners should not be made impossible because one of the partners is dead. Vaccaro et al. v. Security Bank of Memphis et al., 130 Fed. 436,443. The contrary view is based on the proposition that the court which first secures possession of the funds shall administer them, but there is no need whatever of conflict over the property of the decedent's estate. Partnership assets are liable primarily for partnership debts. After the individual assets of the estate of Lavina Katherine Harris are administered by the Probate Court if there is a surplus to be applied to the partnership debts, it will be turned over to the bank-

ruptcy court. In re Stem & Co. 127 Fed. 547. The order appealed from is AFFIRMED.

In conclusion respondents contend that the Circuit Court made no error in affirming the order of the District Court. It has been the universal practice, with few exceptions, in all of the bankruptcy courts of the United States, to declare all partners bankrupt on the petition of one or more where some have not joined. The exceptions to this rule, are those cases where the Act has been construed to mean that the non-consenting partner could not be declared a bankrupt, but that, nevertheless, the Court had jurisdiction over his individual property for the payment of the partnership debts, thus compelling him to transfer it to the receiver or trustee in bankruptcy. This ruling is contrary to the decision of this Court in Francis vs. McNeal, in that it deprives him of a discharge from his creditors, by whom he may be harassed at any time in the future.

We respectfully submit that the order of the District Court, affirmed by the United States Circuit Court of Appeals, should likewise be affirmed by this Court.

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SUPREME COURT OF THE UNITED STATES

NO. 191 OCTOBER TERM, 1923.

GEORGE R. MEEK,
Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

NO. 192 OCTOBER TERM, 1923.

FLORENCE F. DALE,
Petitioner,

v.

SAME.

NO. 193 OCTOBER TERM, 1923.

ANDREW BREEZE,
Petitioner,

v.

SAME.

Certiorari to Circuit Court of Appeals For Third District.

Supplemental Brief on Behalf of Administrator of John M. Shugert, Deceased, as to Continuance of Proceedings.

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SUPREME COURT OF THE UNITED STATES

NO. 590. OCTOBER TERM, 1923.

GEORGE R. MEEK,
Petitioner,

v.

CENTRE COUNTY BANKING COMPANY, Bankrupt, and GEORGE H. SHUGERT, Administrator of the Estate of John M. Shugert, Bankrupt.

NO. 591. OCTOBER TERM, 1923.

FLORENCE F. DALE,
Petitioner,

v.

SAME.

NO. 592. OCTOBER TERM, 1923.

ANDREW BREEZE,
Petitioner,

v.

SAME.

Certiorari to Circuit Court of Appeals For Third District.

Supplemental Brief on Behalf of Administrator of John M. Shugert, Deceased, as to Continuance of Proceedings.

BRIEF.

The death of John M. Shugert on March 3, 1924, has raised the additional question whether or not the proceedings may be continued.

That Congress intended that no proceeding should abate by the death of a party thereto is plain from the provisions of the Bankruptcy Act of 1898, providing for the application thereto of Courts of equity, and the promulgation of general orders relating to practice. Section 59 provides that a creditor's petition may be amended by additional parties; General Order No. XI provides for amendments to petitions.

Section 8 of said Act provides that:

> "The death or insanity of a bankrupt shall not abate **the proceedings,** but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane," etc.

Under Section 1 (4) the word "bankrupt" shall include a person against whom an involuntary petition * * * * has been filed, or who has filed a voluntary petition; and "creditor" shall include any one who owns a demand or claim provable in bankruptcy.

The executor or administrator of a deceased creditor may prove such claim.

Collier on Bankruptcy, 12th Ed. Vol. 1, p. 787.

That the petition filed in the bankruptcy court by John M. Shugert is involuntary as to the non-consenting partners, is no reason why as to them "the proceedings" should abate. If Shugert had a right under Section 5 of said Act to bring a proceeding in the form voluntary as to himself and involuntary as to his non-consenting partners, we contend that the proper construction of said Section means that no portion of the proceedings should abate, although Shugert in addition to being a debtor, also stood as a creditor so far as his co-partners are concerned. Not only does said Section provide that the death of a bankrupt shall not abate "the proceedings," but it further provides that **"the same** shall be conducted and **concluded** in the same manner, so far as possible, as though he had not died." To hold that the proceedings abated as to the non-consenting partners, would not be to conduct and conclude them in the same manner, as far as possible, as though the bankrupt had not died.

In the case of Shute vs. Patterson, 147 Fed. 509, where an involuntary petition was filed against a bankrupt who died before service of process upon him, and which also involved the bringing upon the record of his executor and the service of process upon the latter, the Circuit Court of Appeals, Eighth District, in its opinion pages 511, 512 and 513, referring to Section 8 of the bankruptcy Act, said:

"By the act of 1898 Congress went further

than the English act of 1883, section 8 of which provides that 'if a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.' See In re Walker, 3 Morrell, Bankr. Cas. 69, and In re Easy, 4 Morrell, Bankr. Cas. 281. It is the exclusive province of Congress to say when such a proceeding shall be deemed to be commenced and pending in a court of bankruptcy, and what effect thereon the subsequent death of the bankrupt shall have, and it does not appear that its purpose was left in doubt. When the proceedings are once commenced the further continuance thereof after the death of the bankrupt is mandatory; it is not left to the discretion of the court. See In re Hicks (D. C.) 107 Fed. 910; Scheuer v. Smith, etc., Co., 50 C. C. A. 312, 112 Fed. 406 * * * *

"So far as bankruptcy proceedings may be considered as in equity and as involving real property, Equity Rules 56 and 57 authorize the bringing in of parties who should be present during their continuance (see Currell v. Villars (C. C.) 72 Fed. 330), but the methods there provided are not well adapted to the quick moving machinery which the act of Congress has authorized courts of bankruptcy to employ. General Order 37 promulgated by the Supreme Court applies here. It provides for the use of the equity rules and the practice and procedure in cases at law, as nearly as may be, and authorizes the modification thereof and a change in the time allowed for return of process, for appearance and pleadings, etc.

"We are of the opinion that the heirs and personal representatives of the deceased bankrupt

should be brought in before adjudication, and that in doing so the court of bankruptcy may after the appropriate orders frame its process, personal or substituted, in analogy to the rules prescribed by the bankruptcy act for process to a bankrupt."

Nor can the non-consenting partners complain that the administrator of John M. Shugert has been substituted upon the record for the purpose of continuing the proceedings.

Under Section 2 of the Bankruptcy Act, bankruptcy courts are invested with equitable powers so as to enable them to exercise original jurisdiction in bankruptcy proceedings. Section 30 of the Act provides that "all necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

> "A bankruptcy court is a court of equity, seeking to administer the law according to its Spirit, and not merely by its letter. Proceedings in bankruptcy generally are in the nature of proceedings in equity, and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties; where this is so the Court may apply equitable rules, and will be governed by equitable principles."
> Collier on Bankruptcy, 12th Ed. Vol. 1, p. 25-6.

General Order No. XXXVII, provides inter alia:

> "In the proceedings in equity, instituted for

the purpose of carrying into effect the provisions of this Act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be."

Rule 45 of the Courts of equity of the United States provides, in case of the death of a party, for the substitution upon the record of his legal representative.

The Bankruptcy Act makes ample provision, for the substitution upon the record, when necessary, of the legal representative of the deceased bankrupt, and whether the proceeding is voluntary or involuntary; thus providing for the conduct and conclusion of "the proceeding * * * in the same manner, so far as possible" as though he had not died. The following cases are cited as authority on this subject:

Shute et al v. Patterson et al, 147 Fed. 509.
In re Agnew et al, 225 Fed. 650.
In re Hicks, 107 Fed. 910.
In re Larkin, 168 Fed. 100.
Partridge vs. Andrews, 191 Fed. 325.

Consideration may also be given to the fact that Mary C. Harris, a co-partner, whose individual assets are considerably larger than those of any other member of the firm, and who has filed a schedule in the bankruptcy court of her assets and liabilities, has filed no protest. It will probably not be disputed that the net value of her estate is more than twice that of the combined estates of the three appellants.

ADJUDICATION OF PARTNERSHIP AND PETITIONER:

If in the opinion of the Court the proceedings may be continued, and the bankruptcy court is authorized to declare the partnership bankrupt, but not the non-consenting partners, the question whether said court, by petition of the trustee, or otherwise, can compel them to turn over their property to be administered in said court is of vital importance in this case. The question as to the right of the bankruptcy court to declare the partnership without the non-consenting partners, bankrupt, is raised by appellants' fifth and eighth assignments of error (Appellants' Brief, page 6). That the bankruptcy court has such authority, has not been decided by this Court so far as we are able to learn. It has been affirmed in Armstrong vs. Fisher, 224 Fed. 97, and by the United States Circuit Court of Appeals in the present cases (292 Fed. 116).

In conclusion, we contend that if under Section 5 of the Act of 1898, one partner may file a petition to bring into the bankruptcy court the co-partnership and its individual members, so that the partnership property and that of its members may be administered in said Court, then under Section 8 of said Act "the proceedings" will not abate, regardless of the fact that his position as to the non-consenting partners was to some extent that of a creditor. To hold otherwise, would be to ignore that part of said Section which provides that the

proceedings "shall be conducted and concluded in the same manner, so far as possible" as though the bankrupt had not died. It is a fair and reasonable construction of the bankruptcy act to hold that in addition to the definition of the word "bankrupt" as given by Section 1 clause 4, that it includes under Section 5 a partner who files a petition for the purpose of having his individual estate, that of the co-partnership and its individual members, administered in the bankruptcy court.

Respectfully submitted,

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